United States Court of Appeals

for the Second Circuit

APPENDIX

PLEASE RETURN TO
RECORDS ROOM

77-2093

To be argued by
PHYLIS SKLOOT BAMBERGER

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

LYMAN T. SHEPARD,

Petitioner-Appellant,

-against-

LARRY TAYLOR, Warden, Metropolitan Correctional Center; and MAURICE SIGLER, Chairman, United States Parole Commission,

Respondents-Appellees.

Docket No. 77-2093

APPENDIX TO APPELLANT'S BRIEF

ON APPEAL FROM AN ORDER
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

MARTIN ERDMANN, ESQ.,
THE LEGAL AID SOCIETY,
Attorney for Appellant
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PHYLIS SKLOOT BAMBERGER,
Of Counsel.

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DATE	NR.	PROCEEDINGS
1-7-77	1	Filed petition for a writ of habeas corpus.
1-7-77	2	Filed ORDER TO SHOW CAUSE re: for a writ of H.C. & that petitioner be permitted to file his petition without payment of fees etc. ret. 1-10-77 in Rm 506 at 10:AM . Carter J.
1-7-77	3	Fld affdvt of Joan Gill of personal service of the Order to Show upon U.S. Attorney S.D.N.Y. by Pauline Troia.
01-10-77	4	Fld memo-end on entry # 2 re: on consent of parties the matter is referred to Judge Tenney. MacMahon J.(Pat One) m/n
01-19-77	5	Fld notice of motion by petitioner re: an order releasing petit. on bail pending determination of the writ. ret. 1/19/77
01-24-77	6	Fld memorandum Opinion # 45549 re: the petition for a writ of h/c. is denied as is the motion for bail pending determination of the petition. Tenney J. m/n
01-25-77	7	Fld notice of appeal by petitioner from the order entered 1/24/77 to the U.S.C.. Copy to all parties.
01-26-77	8	Fld deft's memo of law in opposition to the petition for a writ of h.
01-26-77	9	Fld petitioners memo of law in support of the petition for w.h.c..
01-26-77	10	Fld affdvt of David O'Connor by deft/ respondent in o
01-26-77	11	Fld affdvt by petitioner re: support of the petition for w/h.c./
3-2-77		Filed transcript of record of proceedings, dated 1-19-77
May 6-77		Filed affidavit of William Quirk, Hearing Examiner for the U.S. Parole Comm. sworn to On Jan. 18, 1977.
May 6-77		Filed notice that the 2nd supplemental record on appeal has been sent to U.S.C.A.
5-31-77		Filed transcript of record of proceedings dated March 7, 1977.
6-24-77		Fld Meme & Opinion # 46022 re: in accord with the decision of the U.S.CA. the petition is grantedHowever the writ is stayed for appli to the U.S.C.A. until 6/21/77 .The Court will entertain an application for bail pending appeal as indicated. TENNEY J.m/n
06-21-77		Filed affdvt of pltff re: oppos to respondents motion to vacate order granting petition.
06-21-77		Filed respondnents affdvt re: the question of mootness.
06-27-77		Filed ORDER that the writ issued on 6.14.77 is vacated & the petition is dismd as moot. petit. no longer to report toprobation pur, the the Courts Order of 6/16/77. TENNEY J.
06-30-77		Fld ORDER TO SHOW CAUSE re a n order releasing petition form all cutody etc ret. 6/30/77 TENNEY J.
07-01-77		Fld. respondent's memo. of law re: opposition to petitioner's motion for reargument and vacatur of this Court's order of 6-24-77.
07-08-77		Fld ORDER TO SHOW TC CAUSE to releas petition . ret 6/13/77
07-08-77		Fdfurther affdv. in support of motion for enforcement of the Order of the Second Circuit.
07-08-77		Fld Affdvt of Gordon Johnson by pltff in oppos. to dft motion to vacate as moo
07-08-77		Fld Notice of Appeal by petitioner to the U.S.C.A form the order entered 6/14/77 & from the order of 7/7/77 denying petitioners motion for re-argument m/n
07-08-77		Fld memo end on OSC docketed 6/30/77 re: motion denied in all respects TENNEY J.
07-08-77		Fld Notice of Appeal by petitioner to the U.S.C.A from the Order entered 7/7/77 denying reargument of theorder of 6/24/77

A TRUE COPY
RAYMOND F. BURGHARDT, Clerk

By _____
Deputy Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

LYMAN T. SHEPARD,

Petitioner,

-against-

LARRY TAYLOR, Warden, Metropolitan Correctional Center; and MAURICE SIGLER, Chairman, United States Parole Commission,

Respondents.

77 Civ. 83 (CHT)

46011

MEMORANDUM

APPEARANCES

For Petitioner: WILLIAM J. GALLAGHER, ESQ.
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Of Counsel: PHYLIS SKLOOT BAMBERGER, ESQ.

For Respondents: ROBERT B. FISKE, JR.
United States Attorney for the
Southern District of New York
One St. Andrew's Plaza
New York, New York 10007

Of Counsel: CARL T. SOLBERG, ESQ.

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TENNEY, J.

On January 24, 1977, this Court denied a petition for a writ of habeas corpus seeking the release of Lyman Shepard from federal custody on the ground that the United States Parole

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Commission ("Commission") had wrongfully denied his request that it issue subpoenas for the institutional records of his term at New York State prison and for the presence of his New York State correctional counselor at his federal parole revocation hearing. Shepard contended that the Commission's refusal to grant the subpoenas unconstitutionally deprived him of due process of law. The Commission's refusal was based upon its decision that such material was not required in determining whether revocation of Shepard's parole was appropriate. Although it was clear that the information would have amplified Shepard's position at the parole hearing, this Court held that Shepard under the facts and circumstances of this case was not deprived of due process by the Commission's refusal to subpoena such information.

On appeal, the United States Court of Appeals for the Second Circuit reversed this Court's holding, explaining as follows:

> "[S]ince the parolee's institutional record can be one of the most significant factors in predicting his ability to live peacefully in society, see Moody v. Daggett, [429 U.S. 78, 84 (1976)], we believe that the Commission should reconsider its decision not to permit Shepard to subpoena his New York State parole file and its failure to require the presence of Mr. Haley [the state correctional counselor] at the hearing. The appellant argues persuasively that the psychological reports in his state file are not 'duplicative,' see 1976 U.S. Code Cong. & Adm. News 367, and will contradict earlier profiles compiled when he violated his federal parole. Mr. Haley, Shepard contends, will supply details of the appellant's progress at Clinton and his testimony will significantly enhance the impact of the conclusory impressions

> recited in his letter to the Commission. We agree with the Government that neither the statute, 18 U.S.C. § 4212 (a)(2)(D), nor applicable regulations, 28 C.F.R. § 2.51, 41 Fed. Reg. 37330 (Sept. 3, 1976), afford the appellant an unfettered right to 'compulsory process.' We, nevertheless, believe that in this unusual case any detailed evidence of institutional progress that will aid at the rehearing to predict Shepard's ability to readjust to society is relevant--indeed crucial." Shepard v. Taylor, Nos. 1210/1, at 3891 (2d Cir. May 27, 1977) (footnotes omitted).

The court of appeals directed:

> "The judgments of the district court dismissing the petitions for a writ of habeas corpus are reversed with directions that the writ shall issue unless the U.S. Parole Commission conducts a hearing in accordance with this opinion within 14 days. The mandate shall issue forthwith." Id.

A new hearing was scheduled for June 10, 1977, and petitioner again requested the Commission to subpoena the records and witness. The Commission again denied the request and adhered to its earlier position that the material sought to be subpoenaed was not necessary for proper consideration of Shepard's case since there was already in the Commission's possession sufficient information regarding Shepard's institutional performance and adjustment.

Since the Commission was instructed to reconsider its earlier refusal to grant the subpoenas in light of the court of appeals' evident belief that the material sought to be introduced was not "duplicative" and was indeed "crucial," and since the court of appeals explicitly reversed this Court's holding

that the Commission's refusal under the circumstances of this case did not amount to a deprivation of Shepard's constitutional right to due process, only one conclusion may logically be drawn from the court of appeals' reversal of this Court's earlier decision: although a parolee does not have an "unfettered right to 'compulsory process'" in a revocation hearing, the circumstances in Lyman Shepard's case are such that the exclusion of the material sought to be subpoenaed deprived him of the opportunity to fully and fairly present his case and that therefore the Commission's action deprived him of due process of law. Thus the continued failure of the Commission to issue the subpoenas in the face of the mandate of the court of appeals is a constitutional deprivation compelling the granting of the writ.

Furthermore, the court of appeals specifically directed that the Commission conduct a hearing in accordance with its opinion within 14 days. Implicit in this directive is the command that the hearing be constitutionally valid. Yet the actual hearing of June 10, 1977 was undeniably infirm in that one of the two hearing examiners was the official who recommended and obtained the parole violation warrant application for Shepard. This situation directly contravenes the requirement of Morrissey v. Brewer, 408 U.S. 471 (1972), that parole revocation hearing examiners be individuals who have played no prior role in the proceedings involving the violation. Thus, the Court must conclude that on this ground as well the Commission failed to con-

duct a hearing in accordance with the decision of the court of appeals.

Thus, the petition is granted and a writ of habeas corpus shall issue. The Court is mindful, however, that the parties may wish final clarification of the court of appeals' directives from that court itself. Accordingly, this Court will stay its writ to allow time for application to the court of appeals or a judge thereof. If no further stay is entered as a result of that application by June 21, 1977, the petitioner must be released.

The petitioner has also requested that a bail application be entertained if this Court granted the writ but stayed its execution. While there is no specific statute authorizing a grant of bail by the district court during the pendency of a habeas corpus proceeding, the court inherently possesses the power to grant such bail in unusual circumstances. Argro v. United States, 505 F.2d 1374, 1377-78 (2d Cir. 1974); United States ex rel. Epton v. Nenna, 281 F. Supp. 388, 389 (S.D.N.Y. 1968). In the latter case, Judge Frankel listed several factors to be considered--including the substantiality of the issues raised and whether there is a danger that the petitioner will abscond while on bail--in deciding whether "this was one of the relatively rare cases in which relief of this kind should be granted." Id. In the instant case, the Court has already decided that the petitioner must be released; thus, a "clear case

on the law . . . [and] on the facts" is presented. See Glynn v. Donnelly, 470 F.2d 95, 98 (1st Cir. 1972). Moreover, the Court also finds that the circumstances of this case, in the words of Mr. Justice Douglas, make "this application exceptional and deserving of special treatment in the interests of justice." Aronson v. May, 85 S. Ct. 3, 5, 13 L. Ed. 2d 6, 9 (1964). Thus, the Court will entertain an application for bail pending appeal of this order, upon which application the petitioner may present evidence on other elements relevant to the application, including but not limited to the likelihood that he will flee.

So ordered.

Dated: New York, New York
June 14, 1977

Charles H. Tenney
U.S.D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

LYMAN T. SHEPARD,

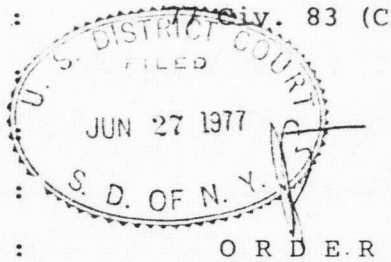
Petitioner,

-against-

LARRY TAYLOR, Warden, Metropolitan Correctional Center; and MAURICE SIGLER, Chairman, United States Parole Commission,

Respondents.

77 Civ. 83 (CHT)



O R D E R

By Memorandum and Order dated June 14, 1977, this Court granted this petition for a writ of habeas corpus but stayed that writ pending application to the court of appeals. By further Order dated June 16, 1977, the Court released the petitioner on his own recognizance pending any proceedings in the court of appeals. The Court is advised that as of this date no application has been made to the court of appeals. The Court is further advised that on June 17, 1977, the United States Parole Commission, by action of the Northeast Regional Commissioner, in reviewing the record of the parole revocation hearing held on June 10, 1977 pursuant to the mandate of the court of appeals, continued the petitioner's parole. This decision was effective the same day, June 17, 1977. Thus, it appears to the Court that the petitioner has now received the result which he originally desired from the Parole Commission and that the essence of the mandate of the court of appeals has been fulfilled. Accordingly,

IT IS ORDERED that the writ of habeas corpus granted by this Court on June 14, 1977 but stayed by this Court on the same day, be hereby vacated and that the petition be dismissed as moot. The petitioner need no longer report to the Probation Office pursuant to this Court's order of June 16, 1977.

Dated: New York, New York
June 24, 1977

U.S.D.J.

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United States Department of Justice
UNITED STATES PAROLE COMMISSION
SCOTT BLDG., SCOTT PLAZA II
INDUSTRIAL HIGHWAY, TINICUM TOWNSHIP
PHILADELPHIA, PENNSYLVANIA 19113

June 8, 1977

Phylis Bamberger, Esquire
Legal Aid Society
Federal Defenders Unit
U.S. Court House, Rm. 509
Foley Square
New York, NY 10007

Re: SHEPPARD, Lyman Thurkle
Reg. No. 37289-115

Dear Ms. Bamberger:

Reference is made to your letter dated May 31, 1977, concerning your request that the Commission issue a subpoena for Mr. S. W. Haley's appearance and the production of certain documents, including parole and psychiatric reports prepared by New York State authorities, for the above-named prisoner's revocation hearing scheduled for June 10, 1977.

Upon review of your request, Mr. Nardoza does not believe that the subpoena of Mr. Haley and the records is necessary for the proper consideration of Mr. Sheppard's case. At the risk of repeating our position and certain facts regarding Mr. Sheppard's case, with which you are familiar, the reasons for our conclusion are as follow:

> The Commission already has in its possession letters and documents from the Clinton Correctional Complex, where Mr. Sheppard was incarcerated, regarding his institution performance and adjustment including a letter from Mr. Haley. In addition, the revocation hearing of January 11, 1977, elicited extensive testimony from Mr. Sheppard and his sister regarding his institutional conduct and behavioral changes while in the custody of New York State authorities, which will be utilized at this revocation hearing. Therefore, it appears that the matters

to which Mr. Haley would testify and the contents of the parole file are already known to the Commission.

Moreover, you have not demonstrated to the Commission's satisfaction why Mr. Haley could not provide an adequate written statement in lieu of his appearance (28 C.F.R. Section 2.51(A)(2)). The Commission traditionally considers written progress reports by correctional officers on the issue of an offender's institutional performance and adjustment. See for example 28 C.F.R. Section 2.14(B). There is no reason other than your conclusory statement that you have provided which would prevent Mr. Haley from providing a written summary in Mr. Sheppard's case.

Regarding psychiatric reports you seek produced, as you are aware the Commission did not rely on any psychiatric reports prepared while Mr. Sheppard was incarcerated in the federal system either at the hearing or in the decisional documents to reach a determination in Mr. Sheppard's case. In addition, information regarding Mr. Sheppard's counseling with Dr. Reyes and his overall changes in attitude and behavior were elicited at the January 11, 1977, revocation hearing.

For your information, a detailed progress report regarding Mr. Sheppard's current institutional performance and adjustment at the Metropolitan Correctional Center will be prepared by Casemanager Karen Amy and disclosed in accordance with applicable Commission regulations. Any additional information that you may wish to present at the revocation hearing will, of course, be considered.

Sincerely,

David E. O'Connor
Post Release Analyst

cc: Frederick E. Martin, Esquire
U.S. Parole Commission
320 First St., N.W., Rm. 339
Washington, D.C. 20537

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CTS:n
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BY HAND

June 24, 1977

The Honorable Charles H. Tenney
United States District Judge
Southern District of New York
United States Courthouse
Foley Square
New York, New York 10007

Re: Shepard v. Taylor
77 Civ. 83 (CHT)

Dear Judge Tenney:

This letter is submitted to the Court in response to Ms. Bamberger's letter of June 23 to Mr. Harry Sydor and her letter of June 24 to Your Honor.

On June 23, Ms. Bamberger called the undersigned complaining that Henry Sadowski, the Parole Commission's Regional Attorney, had advised her that Mr. Shepard would be arrested immediately should he fail to fill out certain papers. We immediately investigated the complaint and informed Ms. Bamberger that the Commission had no intention of arresting Mr. Shepard, and that the Commission is awaiting the forthcoming judgment of this Court with respect to the terms, if any, of Mr. Shepard's release from custody. The enclosed letter of June 23 to Fred Martin sets forth in full detail the sequence of events and substance of the conversations which occurred on June 23.

Today we learned that Mr. Sadowski had, in fact, advised the Probation Office that Mr. Shepard was to be subpoenaed or arrested if he did not fill out certain papers. Mr. Sadowski made a mistake; he incorrectly stated the Commission's position, and he was instructed by this office to call Ms. Bamberger to advise her personally of his error.

While we can appreciate Ms. Bamberger's justifiable concern over Mr. Shepard's status, that concern does not, in our view, justify allegations made in her letter of June 24.

First, she claims that I told her that I "saw nothing wrong with the Commission's action." This is an outright falsehood; I said nothing of that sort. I only pointed

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out to Ms. Bamberger that the question of the terms of Mr. Shepard's release from custody was not settled, and made no comment regarding the propriety of the Commission's action since I knew nothing about it.

In my second conversation with Ms. Bamberger, I told her not only that the Commission had no intention of arresting Mr. Shepard, as she reports, but also that the Commission's position was that it would do nothing pending directions from the Court, as she does not report.

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Ms. Bamberger has further seized upon Mr. Sadowski's mistake and translated it into the conclusion that the Commission's impartiality is doubtful. Mr. Sadowski incorrectly stated the Commission's position. His error was unfortunate; however, it would be unfair to conclude that this error somehow taints the entire United States Parole Commission. The Commission's prompt clarification of this matter was brought to Ms. Bamberger's attention, and belies her speculation of bad faith. We respectfully suggest that "blatant hostility" cannot be thus attributed to the Commission.

The Commission, of course, urges that Mr. Shepard be released on parole, as contemplated by his petition for a writ of habeas corpus, for the remainder of his sentence, but will, as we have previously assured Ms. Bamberger, take no action to supervise Mr. Shepard unless and until the Court so instructs it.

Very truly yours,

ROBERT B. FISKE, JR.
United States Attorney

By: _____
CARL T. SOLBERG
Assistant United States Attorney
Tel. No.: (212) 791-1966

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Criminal Appeals Bureau
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